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# M.K. v. Greece – Implementing children's rights in legal proceedings following an international parental abduction.

March 22, 2018March 20, 2018 Guest Blogger M.K. v. Greece, Right to Respect for Family Life

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**Summary**

In the Chamber judgment *M.K. v Greece* of 1 February 2018 (application no. 51312/16) (https://hudoc.echr.coe.int/eng#{"itemid":["001-180489"]}), the European Court of Human Rights decided by a majority of five votes to two that the applicant's right to family life under Article 8 ECHR had not been violated. The case concerns the inability of M.K., mother of two children, to exercise custody over her son A., despite various court decisions granting her this right. The Court, faced with the difficult task of balancing different rights and interests in this very sensitive area of family law, could not establish a violation of the Convention. Whereas the applicant was prevented from exercising her right to family life, returning A. to his mother in accordance with the 1980 Hague Convention and the Brussels II*bis* Regulation would be against the child's wishes and best interests. This conclusion challenges the boundaries of national authorities' positive and negative obligations to protect the applicant's rights under Art. 8 ECHR.

**Facts of the case**

The applicant, M.K., is a Romanian paediatrician living in France. Her ex-husband A.V. lived in Greece with their two sons, I. and A., born in 2000 and 2003 respectively. When M.K. and A.V. got divorced in 2008, the applicant was awarded custody over her two children. In 2011, the applicant relocated to France and granted temporary custody of her children to her mother at the latter's residence in Greece. After a failed attempt of A.V. to establish the children's place of residence with him, a court order confirmed the children should follow M.K. to France. A. joined his mother a few months later, while I. stayed with his father in Greece. A subsequent French court order from 2013 established A.'s habitual residence in France. His father had contact rights, to be exercised in Greece.

In May 2015, after A. had spent the Easter holidays in Greece, A.V. refused to return A. to France. Consequently, M.K. filed a request for the return of A. in accordance with the 1980 Hague Convention on International Child Abduction. In September 2015, the competent court in Greece ordered the child's return to France. Despite the decision being final, it was not enforced by the Greek authorities. A. remained in Greece with his father and brother. A subsequent French court decision

found both parents should exercise joint parental responsibility in respect of A. Without considering that A. had a brother whose habitual residence was in Greece, the French family judge decided A. should live with his mother, whereas his father was awarded the right to contact and overnight visits. Because A.V. did not appeal, this decision became final as well. Nevertheless, A. was not returned to France.

Between 2015 and 2017, several court actions followed, both on behalf of M.K. seeking to be reunited with A., and on behalf of A.V. seeking to prevent this from happening. A. and his brother were heard by the Greek authorities on various occasions throughout the proceedings. A. firmly confirmed to the Greek court, to social workers and psychologists that he wished to remain in Greece with his brother until the latter finishes secondary school and decides where he would study. With A. still living in Greece, M.K. now complains to the European Court of Human Rights that the judicial, administrative and social authorities in Greece had not respected the custody decisions in her favour, had refused to facilitate A.'s return to France, and had not dealt effectively with her requests regarding the wrongful retention of A. by her ex-husband.

**The Court's judgment regarding the applicant's right to family life**

In accordance with previously established case law, the task of the Court in such sensitive areas as cross-border family conflict is to find out whether the national authorities have done everything that could reasonably be expected from them to respect the applicant's right to family life under Art. 8 ECHR. In particular, the Court must assess whether, within the State's margin of appreciation, a fair balance had been struck between the competing interests of the child, the two parents and the public order, with the best interests of the child being paramount in all decisions concerning him or her (*X.* v *Latvia*, application no. 27853/09, 26 November 2013, §§95-96).

The Court starts its assessment with an enumeration of the general principles it considers applicable in cross-border family situations disputes under Art. 8 ECHR. It continues to apply these principles (i.e. the child's best interests, the voice of the child, the swiftness of the procedure and cooperation between the parents) to the present case. Overall, the Court finds that the Greek authorities complied with their positive obligations. They had taken account of the overall family situation, the way it had changed over time and the best interests of the two brothers. In accordance with international instruments, the Greek authorities had also given due weight to the views of A., who was 13 at the time, and clearly expressed a wish to remain with his brother in Greece. Moreover, the authorities had acted swiftly and thoroughly to the applicant's requests and could not be held responsible for failing to facilitate cooperation, negotiation or mediation between the parties.

Nevertheless, the Court's reasoning gives rise to debate. The question at the heart of the discussion in *M.K.* v *Greece* is whether the failure to enforce a return order of a wrongfully retained child in the past can be seen as a violation of the applicant's family life, irrespective of the child's current objection to being separated from his brother when returned. Dissenting judges Wojtyczek and Koskelo disagree with the majority on this matter. They propose the judgment is unjust and problematic – not only because it is difficult to reconcile with the Court's existing case law, but also due to the fact that the lack of adequate response by the authorities puts the applicant in an unacceptable position of a *fait accompli* or legal limbo.

**Critical reflection on the Court's assessment**

Clearly, *M.K.* v *Greece* is yet another judgment in the Court's extensive case law on cross-border family conflict that demonstrates how this highly contentious area of family law keeps on posing great challenges to the Court (see also McEleavy, 2015 (https://link.springer.com/content/pdf/10.1007%2Fs40802-015-0040-z.pdf)). It is a very difficult and sensitive task to reconcile the best interests and wishes of an individual child with general interests – and in particular with the general interest to promote return so as to dissuade parents to unlawfully retain their children without agreement by the other parent (see also Preamble of the 1980 Hague Convention).

The Court places great emphasis on the **best interests of the child** being paramount in all decisions affecting children (§73). Referring both to *Neulinger and Shuruk v Switzerland (https://hudoc.echr.coe.int/eng#{"fulltext":["Neulinger and Shuruk v Switzerland"],"itemid":["001-99817"]})* and *X. v Latvia (https://hudoc.echr.coe.int/eng#{"fulltext":["X. v Latvia"],"itemid":["001-138992"]})*, the Court argues return under the Hague Convention should not be ordered automatically or mechanically. While illustrative of the fragmented case law about the return of abducted children, this parallel reference is confusing as well. Whereas it is true that the Court upheld a reasoning on best interests in *Neulinger*, it has clarified in *X.* v *Latvia* that domestic courts should not examine return cases under the 1980 Hague Convention on the merits of the underlying custody dispute. Rather, the obligation contains a genuine consideration of factors that could constitute an exception to return under Arts. 12, 13 and 20 of the Hague Convention. This assessment must be made with the child's best interests as a guiding principle.

As such, the best interests of the child is not a right on its own, but rather, as dissenting Judge Koskelo's argues, a substantive consideration when an authority carries out the tasks that have been lawfully entrusted to it. Irrespective of whether it may have been better for A. to stay with his brother in Greece, Judge Koskelo in §7 of the dissenting opinion questions whether the best interests of the child are capable of creating competences which an authority does not otherwise lawfully possess, or of doing away with the limits of those competences (in this case – not executing the order to return A. to France). The Court thus fails to maintain a stable and coherent line with regard to the general principles that should govern its treatment of individual cases.

The same goes for the **right of the child to be heard**. According to Judge Koskelo (§8), this right must be respected within the framework of the relevant proceedings which concern or affect the child. Arguably, this is not what the Court does in *M.K.* v *Greece*. Referring to Article 12 of the Convention on the Rights of the Child, to *M. & M. v Croatia* (application no. 10161/13, 3 December 2015) (https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5160387-6379484&filename=Judgment%20M.%20and%20M.%20v.%20Croatia%20-%20custody%20dispute%20and%20allegations%20of%20child%20abuse.pdf), to Art. 13(2) of the 1980 Hague Convention the Court and to other international children's rights instruments, the Court relies on the substantive right of A. to be heard in legal proceedings that affect him, and have due weight attributed to his views in accordance with the child's age and maturity. It attributes great importance to the hearing of the child by the Greek authorities (§§85-87; §§90-92). A. was given the opportunity to express his views on multiple occasions throughout the proceedings. Since his maturity and understanding are not disputed, it was appropriate to give significant weight to these views when the authorities considered various options. After this long passage of time and multitude of legal proceedings, it is only logical that the views of A. have strongly affected the outcome of the case.

However, it is well established practice in case law under the Hague Convention that the exception under Art. 13(2) is to be interpreted strictly (note – whereas Art. 13(2) is not invoked as a ground for non-return, the views of the child have become decisive later on as a reason not to execute the judgment). As the current case shows, the more time passes, the greater A.'s desire to stay with his brother in Greece and the stronger his opposition to return has become. In 2015, the child's position is not described as an objection to return in the strict sense of Art. 13(2) of the Hague Convention – i.e.

A. explains he has strong ties both to his mother and his father, preferring to spend his time with both of them but feeling insecure about being separated from his brother (§§16-20). However, during the hearings in 2016, the situation evolved up to the point where A. expressed *"une vive colère"* towards his mother for insisting on court proceedings for his return against his will and repeatedly asserted he no longer wished to follow her to France (§§33-37; §§90-92). This is hardly surprising, as Judge Wojtyczek nuances in his dissenting opinion, since it is only logical that with the passage of time, the child becomes more influenced by the parent with whom he resides, while at the same time the role of the other parent, in this case the applicant, diminishes (§3).

This is why the adequacy of measures taken should be judged in particular by the **swiftness of its implementation**. Proceedings relating to the return of an abducted child, including the enforcement of the final decisions, require urgent handling as the passage of time can have irremediable consequences for relations between the child and the parent with whom the child does not live (see, amongst others, *Maire v Portugal (https://hudoc.echr.coe.int/eng#{"itemid":["001-61184"]})*; *Iosub Caras v Romania* (https://hudoc.echr.coe.int/eng#{"fulltext":["Iosub Caras v Romania"],"itemid":["001-76507"]}); *Carlson v Switzerland (https://hudoc.echr.coe.int/eng#{"fulltext":["Carlson v Switzerland"],"itemid":["001-89410"]})*; *R.S. v Poland (https://hudoc.echr.coe.int/eng#{"fulltext":["R.S. v Poland"],"itemid":["001-156261"]})*; and *Adzic v Croatia (https://hudoc.echr.coe.int/eng#{"itemid":["001-152731"]})* where the passage of time lead to a violation of Art. 8 ECHR). In applying this general principle to the present case, however, the Court argues that the authorities in Greece had responded swiftly and thoroughly to the applicants' requests.

This is a striking finding, in particular when noting that the Court only examines the Greek response to M.K.'s demand from July 2016 to award temporary custody to social services until A. was returned to France. The lack of response to the final judgments from 2015, granting custody of A. to the applicant and ordering his return to France, is not further elaborated or problematised in the judgment (§83). Clearly, the passage of time in such sensitive issues as cross-border family separation, characterised by a multitude of legal proceedings and a high level of conflict between the parents, may drastically change the underlying circumstances and relationships within the family. Arguably, dissenting Judge Koskelo (§§36-38) has a point that the lack of celerity and enforcement – owed to deficiencies in the domestic decision-making procedures – has caused a rather chaotic situation in which the applicant was not afforded effective protection of her rights under Art. 8 ECHR.

A final note could be made on **cooperation and mediation**. Under Art. 7 of the 1980 Hague Convention, the authorities in France and Greece have the responsibility to facilitate an amicable solution between the parties. The Court confirms that mutual understanding and cooperation between the family members is often the only possible avenue for a suitable solution that takes account of the needs and psychological state of the child(ren) concerned. A possibility for the parties to enter into mediation is seen as desirable (§78). In addition, the social assistant in Greece confirms *"il [est] impératif pour les parents de trouver une solution de compromis et d'arrêter de perturber l'état psychologique des enfants*" (§85). Even A. had expressed his wishes for a solution to be found (§85).

The Court considers the high degree of conflict between the parents and the fact that M.K. resides in France as an excuse that negotiation or mediation between the parties would be too difficult (§88). Therefore, facilitating cooperation between the parents could not be reasonably expected from the Greek authorities in this context. This conclusion seems to be at odds with the object and purpose of Art. 7 Hague Convention, as well as with other instruments such as the 1998 Recommendation of the Committee of Ministers, recommendations by special commissions and the Hague Practice Guide on Mediation (https://assets.hcch.net/docs/30dc5a61-b930-460f-a10d-0ad13fdb8ad6.pdf) promoting a mediation-based approach. Is negotiation and mediation not intended to operate precisely in such difficult and confrontational situations, as the dissenting Judge Wojtyczek proposes (§6)?

**Conclusion**

It is the task of the European Court on Human Rights to ensure national authorities respond adequately to the complex and sensitive issues that may arise in situations of family break-up in a cross-border setting. It is not disputed children have the right to have their best interests and voice considered in all matters affecting them. Nevertheless, cases of international parental child abduction also require a need for a clear and well-functioning procedural framework to combat illicit transfer and non-return of children abroad. In the present judgment, the majority has prioritised children's best interests over a smooth, predictable and reliable operation of procedural arrangements, and in particular those suggested by the 1980 Hague Convention and Brussels II*bis*. As such, the Court's case law continues to challenge the boundaries of national authorities' positive and negative obligations under Art. 8 ECHR – in particular when it comes to striking a balance between the interests of individual children, the interests of children generally and the public interest in this area.

# One thought on "**M.K. v. Greece – Implementing children's rights in legal proceedings following an international parental abduction.**"

1. **No violation of Article 8 ECHR by Greek authorities regarding the measures taken in a child abduction case** says:
   February 7, 2019 at 12:33 pm

   […] comment on the judgment in English has been posted by Sara Lembrechts – Researcher at University of […]

   Reply (https://strasbourgobservers.com/2018/03/22/m-k-v-greece-implementing-childrens-rights-in-legal-proceedings-following-an-international-parental-abduction/?replytocom=88879#respond)